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Claim-Suppressing Arbitration: the New Rules

David S. Schwartz

Claim-Suppressing Arbitration: the New Rules

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ABSTRACT

Binding, pre-dispute arbitration imposed on the weaker party in an adhesion contract – so-called "mandatory arbitration" – should be recognized for what it truly is: claim-suppressing arbitration. Arguments that such arbitration processes promote access to dispute resolution have been refuted and should not continue to be made without credible empirical support. Drafters of such arbitration clauses are motivated to reduce their liability exposure and, in particular, to eliminate class claims against themselves. Claim-suppressing arbitration, furthermore, violates two fundamental principles of due process: It allows one party to the dispute to make the disputing rules; and it gives the adjudicative role to a decisionmaker with a financial stake in the outcome of key jurisdictional decisions – that is to say, arbitrators have authority to decide their own power to decide the merits, a question in which they have a financial stake. The Supreme Court has facilitated this doctrine through a series of poorly-reasoned and incoherent decisions, in which the Court's liberal wing has been particularly inept at seeing the stakes for consumer and employee plaintiffs. Exploiting Justice Breyer's incoherent line of majority opinions attempting to identify "gateway" issues, the conservative Court majority has recently insulated all questions of enforceability of arbitration clauses from judicial review and is on the verge of allowing corporate defendants to immunize themselves from class actions through use of arbitration clauses.

INTRODUCTION

It's time to be candid and call this thing what it is. We can begin by stating what it is not. It is not ADR. "Alternative dispute resolution," as we mean that term when we say it in its rosy-hued form, does not mean every conceivable alternative to litigation in court. Otherwise, ADR would be understood to include dueling, extortion and assassination. What we mean by ADR is a dispute-resolving process that is either meaningfully voluntary at the beginning or non-binding at the end.

It is not a justice system. While a justice system could, in theory, be made up partly or even wholly by binding arbitration, binding arbitration imposed unilaterally by the defendant is another matter. It is not demonstrably fair. It is not

* Professor of Law, University of Wisconsin Law School.

imposed to promote small claims or otherwise help the "little guy" who is excluded from meaningful access to the courts.

Finally, let's stop calling it "mandatory arbitration," that bloodless, hypertechnical and misleading term. Mandatory implies that the arbitration process is binding on both sides, but that is less than half true: it is voluntarily chosen by the defendant, who drafts the arbitration clause, and "mandatory" only on the party who doesn't want it, typically the plaintiff.

So what is this thing? It is claim-suppressing arbitration. It is designed and intended to suppress claims, both in size and number.

The Arbitration Fairness Act should be passed because consumer and employment disputes are too important a hen-house to be governed by contracts written by foxes – even slightly-regulated foxes. Far from correcting the injustice arising from its own FAA interpretations, the Supreme Court is poised to put the finishing touches on converting the FAA into a radical claim-suppressing statute.

I. NO WAY TO DESIGN A DISPUTE SYSTEM

A. "Mandatory arbitration" is Claim-suppressing Arbitration

The compelling logic of what is commonly called "mandatory arbitration" is that it is intended to suppress claims. In a recent article, I demonstrated that the economically rational motivation for employers and sellers to write pre-dispute arbitration agreements into their adhesion contracts for employment and sales is to keep "high-cost, high-stakes" claims out of court.[1] "High cost" claims are those in which proof is relatively complex and the pre-litigation distribution of evidence is largely in the possession of the defendant. Therefore, extensive discovery is required for the plaintiff to meet his burden of proof, and the potential litigation costs are relatively high. "High stakes" claims are those in which the liability payoff (including both damages and statutory attorneys' fees if any) are relatively high. "High cost/high stakes" claims include, among other things, factually or legally complex individual employment disputes and both employment and consumer class actions.

No other configuration of cases, categorized by costs and stakes, can motivate the employer-seller to adopt a pre-dispute arbitration regime. Low-stakes cases (whether low or high cost) will tend to be those for which claimants have a hard time obtaining contingency fee counsel. According to Professors Sherwin, Estreicher and others, employer/seller defendants tend to prefer to litigate low stakes cases as a deterrent "war of attrition" strategy (my term), in the hope of driving the plaintiffs' process costs up beyond what the low liability stakes would

[1] David S. Schwartz, Mandatory Arbitration and Fairness, 84 Notre Dame L. Rev. 1247, 1264-83 (2009).

justify.[2] Meanwhile, "low cost/ high stakes" cases are those which both sides would be willing to arbitrate. Defendants do not want to avail themselves of litigation to drive up the costs, since that will merely turn the case into a "high cost/high stakes" one, which defendants prefer to arbitrate anyway. More specifically, defendants understand that driving up the costs will probably not deter plaintiffs, who are likely to stay in the game to pursue the high stakes.[3]

Why would employers trade away their litigation preference in "low-cost" cases in order to force "high-cost/high-stakes" cases out of litigation and into arbitration? For that is the net result of a pre-dispute arbitration regime, at least if does not carve out categories of cases. Presumably, defendants calculate that they save more in total cost by arbitrating the "high-cost/high-stakes" claims than they save by deterring the "low-stakes claims."

Where does this cost savings come from? Arbitration supporters would have us believe that it is all process costs. Liability outcomes, they argue, are the same in arbitration and litigation – plaintiffs do just as well in both forums – and they cite a handful of sketchy, methodologically unsound studies to back up their point. (As for the studies that purport to show that arbitration outcomes are as good as litigation ones, let me propose a new rule [with apologies to Bill Maher[4]]: no more citing the arbitration studies unless and until they have been fully rehabilitated as methodologically sound.[5]) In other words, arbitration supporters necessarily

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[2] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 567 (2001); David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1579-80 (2005); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. & Lab. L. 1, 32 (2003).

[3] Plaintiffs, for their part, would have an incentive to rely on the simpler procedures and presumably lower process costs of arbitration: assuming my definitional assumption holds, that "low cost" implies a favorable evidence distribution for the claimant and hence less need for costly discovery processes, "low-cost/high-stakes" claimants have no incentive to prefer litigation (unless they have reason to believe that litigation outcomes are better than arbitration outcomes).

[4] *See* http://www.billmaher.com/

[5] Among other things, I would like to see someone address the criticisms I have made. The short version is this. All of the studies supporting the claim that arbitration outcomes are as good as litigation outcomes, with one exception, are partisan studies entitled to the same respect we give studies funded by the Tobacco industry showing that cigarettes do not cause cancer. *See id.* at 1283-1297. The one exception is the study published by Eisenberg and Hill in the American Arbitration Association magazine. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, Disp. Resol. J., Nov. 2003-Jan. 2004, at 44. It pains me to say this, but I feel it needs to be said, given the frequency with which the piece is cited and the cachet it gets from Professor Eisenberg's sterling reputation: the Eisenberg & Hill study is shoddy work that is unworthy of Professor Eisenberg, an outstanding empirical researcher with a well-deserved reputation for methodological rigor. Its poor quality and misleading conclusions warrant retraction. I have shown in painstaking detail how the data used in their analysis was essentially cherry-picked to exclude the great majority of "high-cost/ high stakes" cases while

imply, all the litigation processes that make it more expensive than arbitration – in particular, discovery – produce no net gains for plaintiffs. They are "outcome neutral," and because costly, they are mere wasteful transaction cost. What were we thinking all these years to allow plaintiffs to have discovery?

That implied assertion seems absurd on its face. Indeed, no arbitration supporter in academia or the judiciary has dared make that sweeping claim; all are careful to stop well short of doing so. In fact, discovery processes are not outcome neutral. Nor are they linear in relationship to outcomes: it is not the case that every dollar of discovery leads to an even increment in additional recovery. On the contrary, discovery is an investment that pays no dividend at all until crossing a line representing the burden of production: until a plaintiff has enough evidence to get past summary judgment, he has a losing case of little or no settlement value.[6] Defendants' keen interest in arbitration of "high cost/ high stakes" cases is not to reap a "peace dividend" of purely process costs, but in the hope that tamping down process costs – primarily by severely limiting discovery – will translate into tamping down ultimate liability costs. It is an interest in claim suppression.

The motivation of employers and sellers to use arbitration as a claim-suppressing technique is borne out by their positions with regard to class actions. Nothing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational. Two paradigm examples are all too common. In the consumer setting, low-dollar-value rip-offs that generate large revenues because practiced on a wide scale -- unauthorized charges to credit card holders for unsolicited "credit insurance," for example – can go entirely unremedied without a class action. Small, quotidian violations of wage and hour laws by mass employers would likewise go unremedied if relegated to individual suits. Professor Eisenberg has shown that barring class actions has become a primary factor in companies' choice to use pre-dispute arbitration.[7] Defendants have been fighting that battle in the courts for the past decade and are on the very edge of victory.

B. Traditional versus Claim-suppressing Arbitration

The FAA was designed to enforce arbitration agreements entered into by parties who had substance- and remedy- neutral reasons for preferring non-judicial

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disproportionately including cases brought by apparently elite workers with individually negotiated employment contracts. The study selected a truly unrepresentative sample of arbitration cases that are very likely to inflate the arbitration results. Schwartz, *Fairness, supra* note __, at 1297-1315.

[6] Schwartz, *Fairness, supra* note __, at 1274-80.

[7] *See* Theodore Eisenberg, et al., *Arbitration's Summer Soldiers: an Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 Mich J. L. Reform 871, 876 (2008).

but binding dispute resolution. The great error of the 1980s to today has been the Supreme Court's reinterpretation of that statute to extend the pre-dispute arbitration option to parties whose intention is to suppress claims.

Arbitration under the FAA was not intended to be a claim-suppressing vehicle for the benefit of wealthier parties in one-sided contracts. As Professor Stone shows in her leading account of the history of pre-dispute arbitration agreements, "the FAA was enacted in response to the commercial community's desire to strengthen the internal arbitration systems of trade associations."[8] Arbitration would control the costs of disputing and therefore the cost of doing business; rules of decision would be supplied by industry insiders according to the standards and norms of the particular trade rather than the general and arcane contract rules created by judges; and disputes could be kept "in the family" rather than put on expensive public display in the courts.[9]

On the other hand, classical arbitration pursuant to pre-dispute agreements does not fit nearly so well when the dispute is between parties who are not part of the "self-regulat[ing] ... normative community" of a trade association. There are much less likely to be agreed private norms to supply rules of decision, less mutual interest in keeping the dispute "within the family," a greater likelihood of a public interest in the dispute, and a greater need to resort to the rules of decision created by public institutions. Moreover, while cheap and fast dispute resolution is all well in theory, the "insider v. outsider" dispute is more likely to involve disparities of wealth and knowledge for which the presence of lawyers – though more expensive – can make the playing field more level.

All of these limitations of traditional private arbitration were very much in mind of the Supreme Court when it held, in *Wilko v. Swan*,[10] that arbitration was an unsuitable vehicle for the resolution of claims under public regulatory statutes. In overruling *Wilko*, the Court said, not that classical arbitration was adequate for public law disputes after all, but rather that arbitration itself had changed -- by the

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[8] Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N. C. L. Rev.931, 994 (1999). The history is described in detail at pp. 969-94. *See also* David S. Schwartz, *If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration,"* 8 Nev. L. J. 400, 402-06 (2007).

[9] CLARENCE F. BIRDSEYE, ARBITRATION AND BUSINESS ETHICS 35 (1926); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 45-46 (2d ed. 1985); Reginald Alleyne, *Delawyerizing Labor Arbitration*, 50 Ohio St. L.J. 93, 94 (1989); William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 Wash. U. L.Q. 193, 212; Philip G. Phillips, *Synthetic Courts - A General Introduction*, 83 U. Pa. L. Rev. 119, 126 (1934); Joseph Antonio Raffaele, *Lawyers in Labor Arbitration*, Arb. J., Sept. 1982, at 14, 15; Schwartz, *supra* note 1, at 70-73; Stone, *supra* note __, at 976-79; Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. Pa. L. Rev. 132, 144 (1934).

[10] 346 U.S. 427 (1953), *overruled by* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

introduction of more lawyers as arbitrators and by the increasing judicialization of arbitration processes.[11]

Overruling *Wilko* and the public policy exception to pre-dispute arbitration enforcement,[12] was a mistake. The existence of statutes to regulate the relationships of employer-employee, consumer-seller, franchisor-franchisee and the like indicate an inequality of bargaining power that vitiates meaningful consent to secondary contract terms like arbitration agreements. Moreover, as will be explored below, the motivation to use dispute-control provisions in adhesion contracts is invariably to suppress claims.

But even if one accepts the premise that the FAA applies to claim-suppressing arbitration clauses, the Supreme Court, particularly the various liberal justices, have been grievously short-sighted, inattentive or plain dense in failing to draw distinctions between claim-suppressing arbitration clauses and commercially reasonable ones. At a minimum, the Court should have been far more cautious about applying rules from cases involving disputes between substantial commercial entities with roughly equal power to bargain over arbitration terms – the parties in the recent *Stolt-Neilsen* case are illustrative[13] – to cases involving adhesion contracts imposed on employees and consumers. Likewise, rules arising out of labor arbitration, where the union has much greater bargaining power than an individual employee, do not always translate appropriately into the adhesion contract setting.[14] Yet the Court has invariably treated these situations as interchangeable[15] – a mistake whose full implications are only now becoming manifest.[16]

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[11] Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); *see* Schwartz, *supra* note __, at 406-12, 417-19.

[12] *See infra* §II.A; Schwartz, *supra* note 1 at 95-103.

[13] Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010); *see infra* §II.B.

[14] *See, e.g.*, Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 Cath. U. L. Rev. 919, 932 (1998). Professor Corrada argued that, despite legislative history in the 1991 Civil Rights Act that "cautions against permitting compulsory arbitration of statutory claims," *id.* at 932, the same "arbitral imperative" that led the Court to embrace labor arbitration in the 1950s would lead to parallel developments in private employment arbitration under *Gilmer*. His analysis has proven remarkably prescient. *See id.* at 936-939.

[15] *See, e.g.*, Green Tree Financial Corp. v. Bazzle, 539 U.S.444 (2003) (applying "arbitrability" rules from labor cases to adhesive consumer contract); PacifiCare Health Sys. v. Book, 538 U.S. 401, 404 (2003) (applying arbitrability result in Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995), a business-versus-business case, to adhesive consumer contract).

[16] *See infra* §II.B.

C. What We Learned in Law School about "Due Process"

Two glaring violations of very basic due process principles underlie arbitration law. The principles are that:

> (1) Parties with a financial stake in the outcome cannot be neutral adjudicators; and
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> (2) A party to a dispute is not given the exclusive right to decide key dispute resolution rules simply because he is wealthier and more powerful.

Claim-suppressing arbitration violates both these principles. I find it disappointing that courts and commentators schooled in U.S. constitutionalism and the rule of law are not continually shocked and appalled by this central feature FAA jurisprudence. I can only attribute our collective blasé attitude to one of two mental responses. One is the situational ethics of legal sophisticates who are happy to find "constructive" "consent" in any adhesion contract term that seems to them consistent with sound commercial policy. The other is a kind of jurisprudential Stockholm Syndrome: the moral objections have been whipped out of us claim-suppressing arbitration opponents to the point where we are grateful and celebratory every time a court creates a tiny, narrow exception to the general regime of claim-suppressing arbitration.

1. Financial stakes

Disputes over arbitration and FAA interpretation – in particular, the entire 20-year debate over claim-suppressing arbitration – are not disputes about the underlying merits of cases but over the question "who decides." In a fairer and more plain-spoken era, the Supreme Court expressly recognized that "who decides" can affect the substantive outcome.[17] So the procedural question – deciding who decides – is a decision that matters and a decision worth contesting. Will the merits be decided in arbitration or in court?

The Supreme Court, in a long and tortuous sequence of decisions, beginning with *Prima Paint* in 1967[18] and continuing to the present day, has increasingly empowered the arbitrator to decide "who decides," narrowing the role of the court to deciding the enforceability of arbitration agreements only where the agreement is silent on the "who decides" question. As will be discussed further below,

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[17] *See, e.g.*, Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (concluding that compelling arbitration is "outcome-determinative" for purposes of *Erie*-doctrine); *Wilko*, 346 U.S. at 435-37; *see also* Boyd v. Grand Trunk Western R. Co., 338 U.S. 263 (1949) (voiding adhesive venue clause in employment contract as applied to an action under the Federal Employers' Liability Act).

[18] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

Rent-a-Center v. Jackson,[19] decided last term, authorizes would-be defendants to add a simple contract term that would deprive a court of any power to review the enforceability of an arbitration agreement. A court – state or federal -- presented with an arbitration agreement containing with a properly-drafted *Rent-a-Center* clause *will have no discretion but to enforce the clause*. This sweeping – breathtaking, really – implication of *Rent-a-Center* escaped even the dissenters.[20]

The bottom line is that all questions about whether the arbitration agreement is enforceable are to be decided by the arbitrator. It has not escaped the notice of some of us that an arbitrator has a financial stake in the outcome of this decision. If the arbitrator decides that the arbitration agreement is unenforceable, he loses income. Assume a modest case: 10 hours of prehearing work, 15 hours of hearing and 5 hours to write up an award. Such a case can easily mean $10,000 or more of income to the arbitrator.

So what that this jurisdictional decision is not a merits decision. It is a contested decision, one of significant import to the parties. It is deemed so important that – at least when arbitration is denied by a court – the decision is immediately appealable.[21]

Perhaps there are cases in which an arbitrator has determined that the agreement is unenforceable. If you were forced to bet, however, how would you bet most of these enforceability issues are decided? In the analogous situation, where arbitrators are asked to decide whether an ambiguous or "silent" arbitration clause permits certification of an arbitral class action, it appears that arbitrators have tended to act consistently with their financial interest and decide to certify class actions – thus guaranteeing themselves months of full employment.[22] Indeed, that practice has goaded the Supreme Court into stopping it in *Stolt-Neilson*, discussed below.

The idea that a decision will be rendered by a financially interested adjudicator is positively medieval.

The financial bias of purported "neutrals" does not start or end with the arbitrator's financial stake in finding in favor of his own jurisdiction. It infects the entire system. Claim-suppressing arbitration is a mass phenomenon. Employers impose it on their entire workforce; commercial sellers and service providers impose it on their entire customer base. If there has ever been an instance of an individual worker imposing arbitration on an employer or an individual consumer imposing arbitration on a large corporate seller – I'm talking about ordinary folks, not the incoming CEO of Bank of America or Bill Gates buying a vacation home – I'd love to hear about it.

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[19] 130 S. Ct. 2772 (2010).

[20] *See infra* §II.B.

[21] *See* Federal Arbitration Act, § 16, 9 U.S. C. § 16.

[22] *See Stolt-Neilsen*, 130 S. Ct. at 614; *Bazzle*, 539 U.S. at 449.

What this means is that the vehicle for claim-suppressing arbitration is the standard-form adhesion contract. And what *that* means is that the drafter of the adhesion contract – the employer or the commercial seller – has the sole and exclusive right to choose arbitration. *That*, in turn, means that pre-dispute arbitration, as a service, is purchased solely and exclusively (in this context) by the employer/seller – that is, the claim-suppressor.

From the vantage point of the arbitration provider then, arbitration is a service it sells to the claim-suppressor. The consumer or employee is merely a third-party "beneficiary" (if that is the word) of that primary customer-service relationship. There is no economic incentive for arbitration providers to make pre-dispute arbitration attractive to employees/consumers: they never purchase the service, because, in effect, they can't purchase the service. But there is naturally an economic incentive for arbitration providers to make pre-dispute arbitration attractive to claim-suppressors.[23]

Academics don't like to attack AAA. AAA sponsors conferences and research, it sends nice people to conferences sponsored by us. AAA folks are always polite and friendly. AAA takes the high road in trying to run arbitration in a fair way, and takes the lead in trying to tweak arbitration rules to make them less unfair. In short, AAA is the good cop in a good-cop / bad-cop system. I have two points to make about this. First, let's not forget the National Arbitration Forum.[24] Second, buyers of claim-suppressing arbitration consist entirely of entities desiring to suppress claims. If arbitration providers, including AAA, refuse entirely to cater to the wants of those customers, the market dries up. AAA, like the other arbitration providers, has an incentive to stay just a step ahead of legal fairness requirements, perhaps, but to make arbitration as defendant friendly as possible without failing a judicial sniff test. Moreover, AAA, like other arbitration providers, oversees arbitrator selection: it determines who is in its pool of arbitrators; and from that pool, it will provide a short list to disputants under its

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[23] I hope no one is now retorting "but AAA is a non profit!" So are hospitals, but they advertize, compete with one another for customers, seek to grow their business, and give their management substantial salaries and bonuses. In other words, the incentive of this model of non-profits to be solicitous of their customers is no different from that of profit-making firms. AAA's 2009 Annual Report illustrates this point eloquently: AAA in 2009 "identified and leveraged new growth opportunities[.]" With over $100 million in assets at the end of 2008, AAA has an annual "public education" (i.e., advertizing) budget between $1 and $2 million dollars. *See* AAA 2008, 2009 Annual Reports.

[24] The National Arbitration Forum was sued by the State of Minnesota for consumer fraud. NAF conducts consumer debt collection arbitrations yet, according to the complaint, is owned by a hedge fund which in turn owns substantial interests in debt-collection businesses. *See* Minnesota v. National Arbitration Forum (Minn. Dist. Ct., Fourth Dist., Complaint filed July 14, 2009), posted at http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf.

As part of a settlement of that suit, NAF agreed to cease administering credit card and consumer arbitrations in Minnesota. http://www.npr.org/templates/story/story.php?storyId=106913248.

arbitrator-selection protocol. When an important customer sits down for dinner at a restaurant, do you think the manager is indifferent about who will wait on the table?

This argument is not intended to – and reasonably should not – give offense to individual arbitrators, some of whom are my colleagues. Indeed, those who take umbrage at my suggestion of financial bias entirely miss the point. I am not suggesting that arbitrators – either as a class or any particular individuals -- are venal or otherwise prone to acting in bad faith. The point is that the system of arbitration as a structural matter creates financial incentives to decide questions of arbitrator jurisdiction ("who decides") and even merits issues favorably toward those who pay them. That argument does not depend at all on individual good faith or bad faith. The objections I frequently hear at conferences from arbitrator colleagues – which boil down to "but *I* am a fair person!" – were conclusively answered long ago by James Madison: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[25] The due process principle that the role of neutral adjudicator will not be given to a financially interested party is, in effect, one of those necessary external controls. I merely suggest that even arbitrators are not angels.

2. Disputing rules

Every eight-year old kid has the good sense to understand that permitting the playground bully to make the "dispute resolution" rules – "we'll arm wrestle, and if I win, I get to keep your lunch money" – is "no fair." This principle has somehow eluded the legal establishment's understanding when it comes to pre-dispute arbitration.

Binding arbitration is a dispute resolution process backed up by statutes that for all intents and purposes convert its judgments into those of a court. Though private, it is an adjunct to government. Generally speaking, our governmental institutions are statutory, not contractual, creations. There is no constitutional justification for a rule that "the wealthier party has the sole and exclusive right to make the rules."

To be sure, wealth commands advantages in virtually all social and political arenas, including legislative. But sometimes sheer numbers win out and wealth is regulated.

Arbitration supporters have argued that claim-suppressing arbitration is politically and constitutionally sound because of the presence of two factors: (1) it is outcome neutral relative to litigation and (2) it leads to greater access to dispute

[25] The Federalist, No. 51 (Madison).

resolution for "the common folk."[26] The latter argument has been summed up by Professor Estreicher in a folksy homily in which litigation is "cadillacs for the few" and arbitration is "Saturns for the many."[27] Regrettably, Saturn is out of business. But let's not take the metaphor too literally: the problem acknowledged by Professors Estreicher and Sherwin is that this economy car (Saturn or what have you) is only available to the many by enforcing the defendants' own arbitration agreement against him – hoisting him on his own petard, if you will.[28]

Here are two more "new rules." (1) No more claiming that mandatory arbitration is outcome neutral until that counterintuitive claim is proven by rigorous, methodologically sound research.

(2) Stop contending that claim-suppressing arbitration is a good deal for "the many." Period. It is hard to believe that intelligent people can believe that argument. I can only assume, out of respect for the intellects of those who advance it, that they are being cynical and disingenuous. I've shown at length why this argument doesn't work.[29] To begin with, why should legitimate "high-cost / high-stakes" claims be sacrificed as a bribe to induce corporate defendants to arbitrate "low stakes" cases? Proponents of this argument never offer any moral or political justification for it, beyond the insinuation that employment discrimination victims and consumer class action members are Cadillac-driving elitists. Second, where does anyone get the idea that claim-suppressing arbitration welcomes or attracts the filing of more claims, large or small? Simple micro-economics tells us that an employer will switch back to a litigation regime the moment it perceives that the cost of arbitrating many smaller "Saturn" claims exceeds the cost of litigating fewer "Cadillac" claims; so the number of Saturns is necessarily capped, and "the many" may not be that many. Indeed, empirically, there is no support for the argument that arbitration is more accessible to "the many" than litigation is. As a thrown-down gauntlet to interested researchers on this question, I have pulled together (admittedly loosely) some estimates suggesting that, controlling for the limited number of AAA mandatory arbitration clauses, employees are five times more likely to file their claims if they have access to court than if they are forced to arbitrate with AAA.[30] Finally, if purveyors of this "Saturns for Cadillacs" argument were genuinely interested in the disputing rights of "the many," why have they never proposed an amendment to the FAA requiring

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[26] *See* Schwartz, *supra* note 1, at 1250-51.

[27] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001).

[28] *See id.;* David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1579-80 (2005); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. & Lab. L. 1, 32 (2003).

[29] Schwartz, *supra* note 1, at 1315-33.

[30] *Id.*, at 1321-22.

arbitration of all small or "low stakes" claims while allowing class actions and other "high stakes" claims to go to court? Wouldn't that make everyone happy? Oh, right … not the defendants, I guess.

What kind of a way is this to make a dispute resolution law? The wealthy party – the employer or seller with the power to impose an adhesion contract – has the exclusive right to decide how disputes will be resolved. How can this possibly conform to due process?[31] Claim-suppressing arbitration supporters justify the FAA with arbitrary, retrofitted rationalizations, including increased pressures to make arbitration more like litigation, and by barely straight-faced reassurances that, despite the beliefs and intentions of claim-suppressing defendants, this arbitration system is really a better deal for claimants than litigation is. The ordinary claimant whose interests we all bandy about did not have a say in the 1925 FAA enactment of a business-to-business dispute statute that did not directly concern them. They have had precious little say since the Supreme Court began to turn the statute against them in the early 1980s. Ordinary folks don't always win the legislative game, but in this instance, they have never even been allowed to take the field.

II. LOST IN THE DESERT: THE SUPREME COURT'S FAA JURISPRUDENCE

The Supreme Court is as irretrievably lost in its arbitration jurisprudence as it has ever been in any line of cases in its troubled history. As Justice O'Connor famously put it, "the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[32] Court majorities have reflected combinations of justices who are unwilling and those who are unable to undo the errors.

The broad pattern of Supreme Court decisions in this area has been one of confused decisions later gelling into clearly bad decisions. Confused decisions have been of two distinct types. The first involve procedural or jurisdictional issues of such hypertechnicality that the authors and readers of the opinion have difficulty in understanding how the decision tends to ratify a former, or pave the way for a future bad decision. *Moses H. Cohen*[33] – the patriarch of deeply confused FAA decisions – is the original case of this type; *Vaden v. Discover Bank*[34] the most recent. The second type of confused decision is one in which the Court consciously avoids a clear decision, finding some ground to dispose of the

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[31] *See* Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 Harv. Negot. L. Rev. 11, 48-50 (2005); Richard C. Reuben, *Democracy and Dispute Resolution: the Problem of Arbitration*, 67 L. & Contemp. Probs. 279 (2004).

[32] Allied Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

[33] Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983).

[34] 129 S. Ct. 1262 (2009).

case that reserves the real issue for another day. Invariably, in the arbitration context, this too-clever-by-half practice leads to an exquisitely Delphic holding: *Bazzle*[35] and *Wright v. Universal Maritime*[36] are shining examples. Just as *Wright*, the confused decision, ultimately led to *Pyett*,[37] the bad one, so *Bazzle* will produce a bad decision in the much-anticipated *Concepcion* case,[38] which will do away with the consumer/employee class action once and for all.

A. Background

The story of FAA jurisprudence since 1983 has been one of justices who should know better unwittingly backing themselves into an untenable position and then failing to perceive even a need to find a way out. Of the 18 past and present Justices who have participated in FAA decisions since 1983, only perhaps two (Stevens and O'Connor) showed any signs of having a clear idea of the stakes and implications of FAA decisions. The rest have been dense, inattentive, shortsighted or opportunistic. As a result, there has not been the sort of clear and consistent "5-to-4" debate that has typically characterized analogous questions in which advocates of employee and consumer rights have been pitted against advocates of "tort reform." Only occasionally and haltingly have justices bothered to distinguish truly defendant-imposed arbitration from purely commercial pre-dispute arbitration agreements.

The willingness of characteristically liberal justices like Souter, Ginsburg and Breyer to follow stare decisis uncritically,[39] or to fall out into fragmented voting positions over obscure technical points,[40] bespeaks a lack of understanding of how the decisions would affect the rights of generally disadvantaged litigants. One gets the impression that FAA cases – whose complexity is deceptive – simply could not command sufficient attention from key justices to figure out what any given holding would mean and where it would take the law.

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[35] 539 U.S. 444.

[36] Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998).

[37] 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009).

[38] AT&T Mobility LLC v. Concepcion, No. 09-89 (decision pending).

[39] *See., e.g.,* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) (per Breyer, J.) (Stevens, Souter, Ginsburg and Breyer voting to uphold the much-criticized, consumer-unfriendly decision in Southland Corp. v. Keating, 465 U.S. 1 (1984)); Doctor's Assocs. v. Casarotto, 517 U.S. 681 (1996) (per Ginsberg, J.) (same); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006) (Stevens, Souter, Ginsburg and Breyer wing voting to apply *Prima Paint* to uphold arbitration against consumer interests).

[40] *See., e.g., Bazzle*, 539 U.S. at 444 ("Breyer, J., announced the judgment of the Court and delivered an opinion, in which Scalia, Souter, and Ginsburg, JJ., joined. Stevens, J., filed an opinion concurring in the judgment and dissenting in part. Rehnquist, C. J., filed a dissenting opinion, in which O'Connor and Kennedy, JJ., joined. Thomas, J., filed a dissenting opinion.")

I have written elsewhere of what I call the "two big mistakes" of FAA jurisprudence.[41] One error was the dismantling of what had become known as the "public policy exception" to the FAA. Two Supreme Court decisions, *Wilko v. Swan*[42] and *Alexander v. Gardner Denver*,[43] and an influential Second Circuit decision, *American Safety Equipment Co. v. J.P. Maguire & Co.*,[44] had developed the doctrine that statutory claims "of great public interest" – such as the Securities Act of 1933, the Civil Rights Act of 1964 and the Sherman Antitrust Act – could not be subject to compelled arbitration to prevent plaintiffs from taking these claims to court.[45] Despite references in these cases to the rights of individual claimants, the gist of these holdings was the notion that arbitrators were narrow industry-or-trade specialists, often non-lawyers, and thus not sufficiently judicial in their craft and outlook to render decisions on complex and socially-important statutory claims. The "public policy exception" cases did not stress, and indeed barely mentioned, the concept that these statutes all arose to regulate the overreaching party in a one-sided transaction; and that it was therefore perverse to allow that regulated party to choose dispute resolution rules that it deemed advantageous, under the very nose of regulation.

That omission was unfortunate, for two reasons. First, the courts missed the opportunity to develop a theory and jurisprudence of claim-suppressing arbitration: that the FAA was not designed to enforce arbitration agreements in one-sided, regulated contractual relationships. Second, the stated rationale for the public policy exception was predictably undermined as the ranks of arbitrators were increasingly filled by lawyers rather than trade professionals. It was thus easy for the Court to overrule the public policy cases without directly confronting – and perhaps, in the instance of some justices, without perceiving -- the problem of claim-suppression. Between 1985 and 1991, the Court overruled *American Safety* and *Wilko* and severely curtailed *Alexander*.[46] A central rationale for these rulings was stated in *Mitsubishi*: "we are well past the time when judicial suspicion of the

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[41] David S. Schwartz, *If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration,"* 8 Nev. L. J. 400, 406 (2007).

[42] 346 U.S. 427 (1953).

[43] 415 U.S. 36 (1974).

[44] 391 F.2d 821 (2d Cir. 1968).

[45] *Wilko*, 346 U.S. at 435, and *American Safety*, 391 F.2d at 825, held that pre-dispute arbitrations were unenforceable for Securities Act and Sherman Antitrust claims, respectively. *Alexander*, 415 U.S. at 51-52, held that a labor arbitration could not preclude subsequent court litigation; though many lower courts construed *Alexander* to mean that a non-union pre-dispute arbitration agreement was unenforceable as to Title VII claims. *See* Schwartz, *Enforcing*, *supra* note __, at 93-94 & n. 242.

[46] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (overruling *American Safety*); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (overruling *Wilko*); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (overruling *Alexander*'s application to non-union pre-dispute arbitration clauses).

desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[47]

The other error was the decision in *Southland Corp. v. Keating* and its progeny[48] to federalize arbitration law by holding that the FAA preempts state law. The manifold implications of this decision include: making a needlessly complex hash of arbitration law by interpenetrating federal and state judge-made contract doctrine; creating a jurisdictional anomaly by holding the FAA to be the only "substantive" federal law that creates no federal question jurisdiction; inhibiting the states' efforts to prevent misuse of arbitration clauses as loopholes in consumer protection law; and, of course, flouting the basic federalism principle, unanimously accepted by the court in other contexts, that Congress cannot constitutionally make procedural rules for state courts.[49]

Here it is worth pausing to consider the handiwork of Justice Breyer. A member of the court's liberal wing who presumably is inclined to take the side of employee and consumer rights claimants against the entrenched interests of corporate defendants, Justice Breyer brought powerful intellectual credentials to his job as justice. He had earned a great reputation, first as a law professor and then as an experienced appellate court judge. This means that he should have done better. I doubt whether any Justice has been more unable to see the forest for the trees in any jurisprudential area in the Court's history than Justice Breyer in his arbitration opinions.[50]

Justice Breyer wrote the majority opinion in *Allied-Bruce*, the case which offered the last clear chance to overrule *Southland*. *Allied-Bruce* squarely raised the question of FAA preemption in a case in which amicus briefs on behalf of 20 state attorneys general urged that *Southland* be overruled. A nationwide pest-control company sought to enforce its adhesive arbitration clause against a consumer in Alabama, where adhesion arbitration agreements were presumptively unenforceable by statute. The stakes of the case, for arbitration law, would have been to allow states to regulate arbitration agreements in purely state law consumer protection cases. Instead of focusing on the implications for consumer and employment rights of imposing a federal pro-arbitration regime on adhesion contracts, the four liberal justices were apparently intent on litigating abstract federalism questions *a la* the pending *United States v. Lopez* (argued two months

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[47] *Mitsubishi*, 473 U.S. at 626-27; *accord Rodriguez de Quijas*, 490 U.S. at 481; *Gilmer*, 500 U.S. at 30; 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1470 (2009).

[48] 465 U.S. 1 (1984); *see* Allied Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (reaffirming *Southland*); Doctor's Associates v. Casarotto, 517 U.S. 681 (1996) (same); Circuit City Stores v. Adams, 532 U.S. 105, 121-22 (2001) (rejecting argument that Southland be overruled).

[49] *See* Johnson v. Fankell, 520 U.S. 911 (1997); David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 Or. L. Rev. 541(2004).

[50] Justice Ginsburg has been little better, routinely signing on to Breyer's opinions.

before Allied Bruce was decided).[51] This was a sad, pivotal moment in the history of FAA preemption: two Justices (Thomas and Scalia) dissented and argued for overruling *Southland* on the grounds that the FAA did not apply to the states; a third (O'Connor) expressed the same view and concurred with great reluctance; a fourth (Rehnquist) had dissented in *Southland*, but may have begun to see the opportunity to use the FAA as a claim suppressing device. One can't help but think that just one or two liberals could have swung the decision the other way, had they but understood the stakes.

That is water under the bridge. *Allied-Bruce* is relevant to my point here as an illustration of Justice Breyer's penchant, not only for missing the big picture in arbitration decisions, but for creating mind-boggling distinctions without a difference. See if you can understand this key passage in which Justice Breyer purports to explain when state law does, and when it does not, govern questions regarding arbitration clauses. I know I can't:

> In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent.

The last two sentences (beginning "What states may not do…") simply cannot mean what they say, because they make no sense. An arbitration agreement may be unfair even if its basic terms are fair. "A consumer contract may establish a reasonable sales price, but provide that future disputes will be arbitrated in Borneo before a panel of arbitrators chosen by the seller, with the consumer to pay a $ 1 million forum fee to arbitrate his claim."[52] Why can't states regulate grossly unfair

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[51] 514 U.S. 549 (1995). The Allied-Bruce majority could not see beyond the question of the scope of the commerce clause:

> The pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case. But, it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively -- as, for the reasons set forth above, we do here.

Allied-Bruce, 513 U.S. at 275.

[52] Schwartz, *Power of Congress*, *supra*, 83 Or. L. Rev. at 562.

arbitration clauses in otherwise fair contracts? Moreover, the purported distinction between "general contract law" and targeted regulation of arbitration clauses is incoherent: unconscionability is a general doctrine but can only be meaningful in the context of a specific, unfair clause. Breyer's distinction has bedeviled lower courts ever since.[53]

Justice Breyer's incomprehensible hair-splitting has contributed decisively to a third major problem in arbitration jurisprudence, that of expanding the power of arbitrators to determine their own jurisdiction – that is, to give arbitrator's virtually unreviewable authority to decide "who decides." Justice Breyer's first foray into the "who decides who decides" question came in 1995 in *First Options of Chicago v. Kaplan*,[54] where a professional stock trader suing his stock-clearing company argued that he had not agreed to arbitrate the dispute. Defining the substantive scope of the arbitration agreement as a question of "arbitrability," the Court unanimously held that the arbitrability question should be decided in the first instance by the court absent a "clear and unmistakeable" agreement to submit that question – who decides arbitrability? – to the arbitrator.[55] The opinion went on to suggest that this rule – the court decides arbitrability – is merely a default rule, which can be overridden by clear contractual language giving arbitrability decisions to the arbitrator.

This ruling would be all well and good, provided that the Court would be able to maintain a clear understanding that "arbitrability" encompasses only the question of what substantive claims have been agreed to be submitted to arbitration. Other issues regarding enforcement of arbitration agreements – which might be called "validity" issues – are expressly reserved for courts presented with arbitration clause challenges, pursuant to FAA § 4.[56] Validity might best be understood as going to the question of whether an arbitrator has been contractually brought into being at all – whether a valid arbitration agreement was formed, or whether a prima facie arbitration agreement is unenforceable due to contract defenses such as unconscionability. The problem is that these distinctions are fairly fine-grained, and the terms "arbitrable" and "arbitrability" sound naturally as though they mean "subject to…" or "suitable for…" arbitration – thereby encompassing validity.[57] To complicate matters further, there remain issues in a gray area between substantive "arbitrability" of issues and the contractual "validity" of an arbitration

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[53] *Id*. at 568.

[54] 514 U.S. 938 (1995).

[55] *Id*. at 993-94.

[56] "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." FAA § 4.

[57] "Linguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits." Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).

agreement: What if the claimant missed a statute of limitations in filing an arbitration claim? What if the claimant seeks to certify an arbitral class?

Justice Breyer muddied up these issues in due course. In *Howsam v. Dean Witter Reynolds, Inc.*,[58] the defendant brokerage sought a court order enjoining a securities fraud claimant from going forward in arbitration on the ground that the arbitration claim was barred by the six year statute of limitations provided in the National Association of Securities Dealers ("NASD") arbitration rules.[59] The case might have been resolved simply, without categorizing the question as one of "arbitrability," "validity" or any such difficult category. After all, it was undisputed that a valid arbitration agreement existed and that NASD rules applied; the only question was whether the dispute accrued within the limitations period. Whether one views such a question as factual, or a mixed question of fact and law, it is an affirmative defense to a concededly arbitrable claim rather than a basis to challenge the arbitrator's power to decide; it is thus plainly within the ambit of the arbitrator's decision. Lower courts had tripped themselves up, however, by labeling statute of limitations questions as "arbitrability" questions merely because they are technical rather than merits defenses – even though courts have no trouble realizing that statute of limitations is a waivable, non-jurisdictional defense in court.

Rather than deciding the straightforward question straightforwardly, or laying down clear distinctions between threshold issues for the court as opposed to those for the arbitrator, Breyer unhelpfully interjects further new terminology by introducing the concept of the "dispositive gateway question." He then goes on to suggest that "arbitrability" means

> the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

This classic Breyer "clarity" would not be so bad if the new term "gateway question" is understood as a subset of arbitrability – the scope of substantive issues assigned to the arbitrator. But the problem is that "gateway" sounds even broader, and more inclusive than "arbitrability" – so broad as to include any threshold question, even validity questions that had always been reserved for the court. Recall that "arbitrability" had always been a question presumptively for the court, but contractually assignable to the arbitrator through a "clear and unmistakable" assignment; in contrast, "validity" questions had never been held assignable to the arbitrator. By reconfiguring and thereby confusing "arbitrability" and "validity"

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[58] 537 U.S. 79 (2002).

[59] *Id*. at 82-83.

questions, Breyer in effect opens the door to adhesion contract terms that would purport to assign even questions like unconscionability of the arbitration clause to the arbitrator for decision. This is exactly what was to happen eight years later in the disastrous *Rent-a-Center v. Jackson* decision, discussed below.

But first Justice Breyer would continue this process of unwittingly breaking down the distinction between validity and arbitrability questions. In *Green Tree Financial Corp. v. Bazzle,*[60] two separate consumer class actions were filed in the state courts of South Carolina against Green Tree Financial Corp., a nationwide consumer loan company with a penchant for sharp dealing. Green Tree successfully moved to compel arbitration of both cases; but to its chagrin, both cases wound up before the same arbitrator who certified them as class actions and awarded the claimants approximately $27 million in damages and attorneys' fees. The South Carolina Supreme Court rejected Green Tree's challenge to the classwide arbitration procedure, on the ground that class arbitration was permissible as a matter of state procedural law. The U.S. Supreme Court affirmed, producing a fragmented set of opinions whose end result was part Solomonic and part Delphic – or as the *Stolt-Neilsen* majority would later characterize it, "baffling."

A four-justice plurality opinion by Justice Breyer reasoned that the issue of "whether [an arbitration agreement] forbid[s] class arbitration" [61] was a contract-interpretation question for the arbitrator, and not the South Carolina courts. Accordingly, the plurality – joined in the judgment by a reluctant Justice Stevens – vacated the judgment of the South Carolina Supreme Court, and remanded the case to allow the arbitrator to make this determination.[62] According to Breyer, "gateway" matters for the court to decide include "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy."[63] But questions of "contract interpretation and arbitration procedures" are for the arbitrator – here, whether the arbitration should be a class action was a question of "what *kind of arbitration proceeding* the parties agreed to."[64]

Bazzle was a truly unfortunate opinion. It offered the opportunity for the court to clarify whether and when, as a matter of framework FAA law, class arbitrations

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[60]539 U.S.444 (2003).

[61] 539 U.S. at 451.

[62]It seems probable at this juncture that the arbitrator would construe the contract to allow class actions, since the alternative would entail vacating his own class arbitration awards. *See supra* § I.C.1. Although the arbitrator had himself certified a class action in the *Lackey* action, the Supreme Court observed that he did so only after the trial court had certified a class on the same issues in the *Bazzle* action. Thus, "[o]n balance, there is at least a strong likelihood in *Lackey* as well as in *Bazzle* that the arbitrator's decision reflected a court's interpretation of the contracts rather than an arbitrator's interpretation." 539 U.S. at 454.

[63]539 U.S. at 452.

[64] *Id.* at 452.

are permissible. Instead, the two opinions forming the judgment merely imply, but do not expressly conclude, that class arbitration may be permissible over the objection of the drafting party; but they tell us nothing about whether an unambiguous class action ban would be enforceable. Rather than clarifying matters, Breyer further develops his "gateway issues" approach to create yet another mystifying distinction, that between "a certain type of controversy" and the "*kind of arbitration proceeding* the parties agreed to." The italics are in the original, but all the italics in the world cannot help me discern the difference between "kind" and "type." Nor does it help much to say that "contract interpretation *and* arbitration procedures" are for the arbitrator. The conjunction "and" there destroys any hope of meaning, since any dispute over whether and how an arbitration agreement will be enforced will involve "contract interpretation." Even worse, Breyer in *Bazzle* introduces a third category of threshold issue, those that are to be determined by the arbitrator in the first instance. Class arbitration falls into this category, but for reasons that do not meaningfully distinguish it from what used to be known as "validity" and "arbitrability" issues. The defendants, after all, argued that class actions are per se incompatible with arbitration at all: an argument demonstrating that the class action issue has elements of "validity" analysis. *Bazzle* thus contributes mightily toward a hopeless confusion of (1) enforcement issues that are always to be judicially determined; (2) "arbitrability" or "gateway" issues that are presumptively for the court but assignable by "clear and unmistakable" contract language to the arbitrator; and (3) "questions of contract interpretation and arbitration procedure" a/k/a the "*kind of arbitration proceeding* the parties agreed to."

Anyone hoping to understand that distinction would have to make sense of *Bazzle* in light of *Pacificare Health Systems v. Book*,[65] argued and decided while *Bazzle* was pending. *Book*, authored by Justice Scalia, presented the question of whether a consumer could be compelled to arbitrate his RICO claim pursuant to an arbitration agreement that purported to strip the claimant's right to obtain punitive damages. *Book* thus raised an issue that cuts across arbitrability and validity lines. Viewed through the lens of unconscionability doctrine, the punitive damages remedy-stripping provision is a question of validity of the overall arbitration agreement, and therefore a question to be decided by the court. But a remedy-stripping clause can also be viewed as an "arbitrability" question on the theory that it is intended to limit the arbitrator's power to hear claims creating a right to the stripped-remedy – in *Book*, the right to recover punitive damages. That "arbitrability" question would also be for the court, unless it were "clearly and unmistakably" assigned to the arbitrator. Glossing over all this, the Court unanimously agreed not to decide anything: "since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render

[65] 538 U.S. 401 (2003).

the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract."[66]

The only clear rule emerging from the Court's 2002 term, giving us the trio of *Howsam*, *Bazzle* and *Book*, is this: Questions that cannot command a majority rationale are for the arbitrator.

Am I being unfair in laying this all on Breyer? In *Bazzle*, it is likely that there were not five votes in agreement on these issues: the plurality consisted of Breyer, *Scalia,* Souter and Ginsburg. Rehnquist, O'Connor and Kennedy dissented on the argument that would later win over Justices Scalia and Thomas to capture a majority in *Stolt-Neilsen*: that class arbitration cannot be ordered where not expressly permitted by the arbitration agreement.

No, I think I'm not being unfair. The problem is that Breyer's sort of clever "Court politics" strategy – punt the question to the arbitrator and leave the difficult issues for another day – was too clever by half.

And Breyer's strategy has now blown up in our faces. As will be seen below, by turning every dispute over enforcement of an arbitration agreement into an impenetrably difficult issue, the *Bazzle-Book* approach – all *hard* questions are for the arbitrator – has naturally merged into what will be seen as the *Rent-a-Center* rule: all *enforcement* questions are for the arbitrator.

The liberals would have served the public better by carving out clear positions on what was at stake in arbitration cases over the past 15 years. They can and should have articulated a theory under which the rules for bilaterally-negotiated pre-dispute arbitration agreements between substantial commercial entities are different from claim-suppressing arbitration clauses. They should have identified claim suppression for what it is and stated that, even in dissent. They should have articulated public policies – such as the broad public interest underlying class actions and damage remedies under "private attorneys general" statutes like RICO – that transcend the FAA. They should never have conceded that the availability of such important remedies, particularly class actions, are to be decided under judge-made FAA law rather than other doctrinal regimes. I blame Justice Breyer insofar as he is the author of several of these short-sighted, tactical, too-clever-by-half opinions – and, I suspect, the architect of the behind-the-scenes deals that produced them. But the entire liberal wing is to blame. Even in their dissenting opinions, they have consistently failed to say what is at stake for consumers and employees in these arbitration decisions. They have failed to see that their mincing, incremental steps in FAA cases were all steps backward.

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[66] *Id.* at 407.

B. Recent Decisions: on the Brink of Adopting Claim-Supression

Two of the Supreme Court's arbitration decisions from the 2009 term show the Court on the very brink of an explicit embrace of arbitration's claim-suppressing potential. They represent a new low point in the Court's jurisprudence. But for the fact that arbitration law is something of an doctrinal backwater whose implications are obscured by layers of procedural arcana, there would be a widespread sense that a truly *Lochner*esque set of decisions is unfolding before our eyes.

Stolt-Nielsen S.A. v. Animalfeeds International Corp.,[67] decided in April 2010, addressed the question "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act."[68] A 5-3 majority rejected class arbitration. The plaintiff, AnimalFeeds International, is an animal-feed supplier that participated in a "charter party," a consortium of like business interests that contracts for shipping container space. The defendants, Stolt-Neilsen et al., are "shipping companies that serve a large share of the world market for parcel tankers."[69] In this sense, the parties represent a classic picture of the kind of commercial relationship the FAA was intended to facilitate: substantial commercial entities of sufficient bargaining power to look after their own interests. The arbitration agreement was contained in a standard form used by the plaintiff 's charter party, of which AnimalFeeds was a member. Though a standard form, it is hardly plausible to view the arbitration agreement as adhesive given that the defendants apparently hold sufficient market power to be a plausible target for antitrust litigation, which accounts for the underlying merits dispute. In the wake of a 2003 Justice Department investigation "which revealed that [defendants] were engaging in an illegal price-fixing conspiracy," AnimalFeeds and other charterers filed suits in various U.S. District Courts that were ultimately consolidated into a single class action.[70] The Second Circuit held that the case must be submitted to arbitration. The parties entered into a supplemental agreement to submit to a panel of three arbitrators the question of whether the arbitration could proceed as a class action (under the AAA Class Rules), given that the arbitration agreement is "silent" on the issue of whether class arbitration is permissible. The arbitrators concluded that the arbitration agreement did indeed permit class arbitration, and the case went back to court to review that ruling.

The Supreme Court rejected the arbitrator's decision, holding that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."[71] Recognizing that

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[67] 130 S. Ct. 1758 (2010).

[68] *Id.* at 1764.

[69] *Id.* at 1764.

[70] *Id.* at 1764.

[71] *Id*. at 1775.

judicial review of arbitrators' decisions "must clear a high hurdle,"[72] the Court concluded that that hurdle was cleared: the arbitrators "exceeded [their] powers" within the meaning of FAA §10(a)(4) by ordering class arbitration where neither the contract language permitted it nor any "default rule" supplied by the FAA, maritime law or New York contract law allowed contractual silence to be construed to permit it. Instead the arbitration panel "imposed its own policy choice," which exceeded its powers since arbitrator's power to decide is a matter of contract, not public policy.

The dissent, by Justice Ginsburg (joined by Breyer and Stevens) was hardly a ringing endorsement of the public policies at stake. "The Court errs in addressing an issue not ripe for judicial review," thunders Justice Ginsburg.[73] Since the parties had agreed to submit to the ruling of the arbitration panel, the class arbitration should have gone forward and only *afterward* been reviewed judicially – perhaps wiping out an award based on years of costly arbitration proceedings. "Were I to reach the merits, I would adhere to the strict limitations the Federal Arbitration Act places on judicial review of arbitral awards."[74] The dissenters thus endorse the Breyer approach of punting important questions to the arbitrator ("The arbitrators decided a threshold issue, explicitly committed to them"), while making only a wan allusion to the public interest in class adjudication and the just-over-the-horizon assault on consumer class actions in the now-pending *Concepcion* case.

> First, the Court does not insist on express consent to class arbitration…. Second, by observing that the parties [here] are sophisticated business entities,' and 'that it is customary for the shipper to choose the charter party that is used for a particular shipment,' the Court apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis….[T]hese qualifications limit the scope of the Court's decision."[75]

Hardly. To be sure, aspects of the majority opinion leave the door ajar to a state law default rule that reads class arbitration into a silent arbitration clause. Yet it would take very little for the five justice conservative majority to recast its holding as an FAA "federal common law" principle that "a party may not be compelled under the FAA to submit to class arbitration *without its consent*." That would preempt state law default rules, assuming there are any. Further, one would be unwise to overlook the majority's touching solicitude for the consent of the non-drafting party: "the [arbitrators'] conclusion is fundamentally at war with the

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[72] The Court once again declined "to decide whether 'manifest disregard'" is the proper standard for judicial review. *Id*. at 1767 n. 3.

[73] *Id.* at 1777.

[74] *Id.*

[75] *Id.* at 1783.

foundational FAA principle that arbitration is a matter of consent."[76] Perversely, it is only because the Stolt-Neilsen defendants were powerful enough to bargain over an arbitration clause, had they chosen to do so, that the Court will take the trouble to consider what they actually consented. In contrast, the Court has had no trouble imposing "constructive consent" notions on parties too weak to bargain over an arbitration clause to conclude that they "consented" to arbitration and were not "coerced." The Court will protect a shipping company that serves a large share of the world market for parcel tankers from its bad arbitration "bargain," but not a credit card customer.

The big issue, never addressed in a Supreme Court majority, plurality, concurrence or dissent, is whether a ban on class arbitration can be effective to ban class actions entirely. By implication, in the aftermath of *Stolt-Neilsen*, the plaintiffs will have to proceed, if at all, in individual arbitrations. The implacable logic of the Court's arbitration jurisprudence is that an arbitration agreement means that arbitration is the claimant's exclusive remedy; and if he can't proceed on a class basis in arbitration, he can't proceed on a class basis at all, since the courthouse door is closed. Despite the thin silver lining identified in the *Stolt-Neilsen* dissent, the answer to this question is foreordained. If a party can refuse its consent to class arbitration implicitly, by making no express agreement to class arbitration, why may not it do so explicitly, with a class action ban?

There are but two ways to escape this box. One is to create a public policy exception as a matter of FAA doctrine by which class actions may proceed in court over the defendant's objection, notwithstanding an arbitration agreement. If, as the *Stolt-Neilsen* majority reminds us, an arbitrator "has no general charter to administer justice for a community which transcends the parties,"[77] then parties should retain access to the courts for class actions which serve broad societal purposes beyond the interests of the named parties, interests that cannot be signed away in private, bilateral agreements.

Good luck with that one. It doesn't take a particularly close reading of *Stolt-Neilsen* to see that such an argument stands little chance with the 5-justice majority, for whom the only cognizable policy is the "consent" manifested in the arbitration agreement, elevated to an overriding national policy under the FAA.

The other escape route is state unconscionability doctrine. As a matter of state law, an arbitration agreement banning class actions is unconscionable, and therefore unenforceable. As a result, the plaintiff has access to court, where of

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[76] *Id.* at 1775; *see also id.* at 1773 ("arbitation is a matter of consent, not coercion"); 1774 ("Underscoring the consensual nature of private dispute resolution…"); 1775 ("class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it simply by agreeing to submit their disputes to an arbitrator"); *id.* ("the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration").

[77] *Id.* at 1774 (quoting Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 581 (1960)).

course a class action is available. This issue has been teed up in *AT &T Mobility v. Concepcion*. Before offering my prediction of the inevitably gloomy result, it is necessary to examine the other horrendous 2010 Supreme Court arbitration decision, *Rent-a-Center v. Jackson*.[78]

In *Rent-a-Center*, decided less than two months after *Stolt-Neilsen*, the Court considered an arbitration agreement between the defendant-employer and the plaintiff employee, Jackson, who filed an employment discrimination suit under 42 U.S.C. § 1981. When Rent-a-Center moved to compel arbitration, Jackson argued that the arbitration agreement was unconscionable under Nevada law. The District Court compelled arbitration, relying on a clause in the agreement providing that "[t]he Arbitrator . . . shall have exclusive authority to resolve any dispute relating to the . . . enforceability . . . of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." The Ninth Circuit reversed, holding that the threshold issue of unconscionability was for the court, not the arbitrator, despite the contractual assignment of the issue.

The Supreme Court reversed. In an opinion that severely strains the concept of a "reasoned decision," a 5-4 majority per Justice Scalia held that the decision on the unconscionability of the arbitration clause was for the arbitrator. A straightforward approach to this question would have been to cite the Breyer line of arbitrability decisions to say that the parties are free to assign any question to the arbitrator by contract. But there is a conceptual problem there, one that might have pricked the conscience even of one or more of the majority justices. If an arbitration agreement is unconscionable, then the victim of the unconscionable contract never really agreed to arbitration at all – and there is no legal basis to authorize an arbitrator to decide anything affecting that party's rights. To get around this problem, the majority relies on the rule of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*[79] In *Prima Paint*, the court held that arbitration clauses were "severable" from the rest of the contract containing them; and therefore, a claim that a contract was procured by fraud had to be submitted to arbitration, unless there was a contention that the arbitration agreement was voided due to fraud "directed to the arbitration agreement itself." Here, in *Rent-a-Center*, the Court extended this long-standing, albeit bizarre, doctrine to an unconscionability argument – adding an even more bizarre twist. Jackson's arbitration agreement with Rent-a-Center, the majority "reasoned," is a contract complete in itself: The "delegation provision," delegating the decision of unconscionability *vel non* to the arbitrator, is a specific clause within that arbitration contract. Under *Prima Paint*, the delegation clause is severable and enforceable when what is being challenged is the unconscionability of the arbitration "contract" as a whole. Therefore, the delegation clause stands, and the question of unconscionability must go to the arbitrator.

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[78] 130 S. Ct. 2772 (2010).

[79] 388 U.S. 395 (1967).

Justice Scalia and his four concurring brethren are not so stupid as to believe that this analysis makes any sense. There will never be occasion to challenge a delegation clause without challenging the overall arbitration clause: it is more or less a logical impossibility, because the delegation clause only comes into play when there is a challenge to arbitration. It is also fatuous to view the arbitration clause as a self-contained, stand-alone contract. Whether it was a separate document, or part of a larger employment contract or job application doesn't matter; as the majority itself states, the arbitration agreement was signed "as a condition of his employment."[80] That means – and the majority justices know this – that the arbitration agreement is part of the employment contract. One could go on and criticize this particular application of the *Prima Paint* rule – but what's the point? Clearly, we have moved beyond the stage where doctrinal niceties will dictate decisions in this area. This is a purely result-driven case in which the majority was determined to send this case to arbitration. It could have quoted "Jabberwocky" as dispositive authority. It could have issued no "reasoned opinion" at all.

While it was nice to see the four liberal justices coming together to dissent, it is worth noting the various ways in which their protests are "too little, too late." The majority opinion gets more than halfway to its result by relying on Justice Breyer's "gateway jurisprudence" that embraces the notion that jurisdictional decisions can be contractually delegated to the arbitrator. It would have been useful, perhaps, had some of the liberals seeded a few of those opinions by suggesting some limits to the principle. In addition, the dissent jibes that "In applying *Prima Paint*, the Court has unwisely extended a 'fantastic' and likely erroneous decision."[81] To be sure, *Prima Paint* was a dubious decision – why should a party that procures a contract by fraud get any benefit of its bargain? On the other hand, in (lukewarm) defense of *Prima Paint*, it can be argued that fraudulent inducement claims are all too easily alleged, and would have provided a gaping exception to enforcement of pre-dispute arbitration clauses; whereas, proof of such claims requires the sort of fact-intensive inquiry into business disputes that arbitrators are traditionally accustomed to. But whatever might be said for applying Prima Paint to its original context of fraud-in-the-inducement claims, the same does not apply to contracts that are voidable on grounds that are largely apparent on the face of the contract: illegality and unconscionability. In any event, three of the four dissenters – Stevens, Breyer and Ginsburg – joined the majority in *Buckeye Check Cashing v. Cardegna*,[82] which extended the *Prima Paint* rule for the first time beyond the fraud context to uphold arbitration agreement in a check-cashing contract that allegedly violated state criminal usury laws. As one consumer rights lawyer

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[80] *Id.* at 2775.

[81] *Id.* at 2785 (quoting *Prima Paint*, 388 U.S. at 407 (Black, J., dissenting)).

[82] 546 U.S. 440 (2006).

noted, the reasoning of *Buckeye* would uphold an arbitration provision in a murder-for-hire contract.[83] One wonders what light bulb went off between *Buckeye* in 2006 and *Rent-a-Center* in 2010 that made the dissenters see *Prima Paint*'s "fantastic" quality.

More glaring is the dissent's inability or unwillingness to perceive, and object, to the glaring implications of *Rent-a-Center*. Unless a delegation clause is assailable under this ruling, then a properly drafted delegation clause strips the court of power to review any "gateway" issues concerning arbitrability or validity. Courts will have no choice but to compel arbitration in every case, irrespective of defects in the arbitration agreement. It will then be up to the arbitrators to determine how to respond to unconscionable and overreaching arbitration agreements.

Is there any basis for arguing that a delegation clause is unconscionable in a manner that, as *Rent-a-Center* purportedly requires, "is specific to the delegation provision" and not applicable to the rest of the arbitration clause?[84] Why, yes there is. The due process problem I mentioned above also stinks of unconscionability: it is unconscionable to require the adhering party to submit a question to an adjudicator with a financial stake in deciding the question favorably to the contract drafter.[85] The contract drafter wants the arbitrator to decide everything. The arbitrator makes money by deciding it has the power to decide the validity of the delegation clause, which in turn permits it to uphold the validity of the arbitration agreement and thereby make more money by conducting the arbitration on the merits. Conveniently, the "procedural" requirement of unconscionability (essentially, a requirement that the contract be one of adhesion) ensures that such a rule would apply in cases with a claim-suppressing structure, but not to truly "freely-negotiated" arbitration agreements.[86]

However, the chances for such an argument to succeed necessarily depend on the Court's willingness to base its decisions on the logical dictates of its own doctrinal pronouncements. Unfortunately, I think we're beyond that in the claim-suppressing arbitration area. It would be a simple matter to turn aside my unconscionability argument – perhaps by saying that the arbitrator's financial stake in the "who decides who decides" question is too minimal to really create a bias; or perhaps by saying that the same unconscionability argument can be directed to the rest of the arbitration clause; or that if unconscionability arguments, even different ones, are directed to both a "delegation clause" and the rest of the arbitration clause,

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[83] Conversation with Paul F. Bland, attorney for respondents.

[84] 130 S. Ct. at 2780.

[85] *Cf.* Graham v. Scissor-Tail, 623 P.2d 165 (Cal. 1981) (unconscionable to name arbitrator with financial ties to contract-drafter).

[86] In the Orwellian world of adhesion contracts, with consent being nothing mere legal fiction to signify that the court finds the contract to be commercially reasonable, it is necessary to qualify consent in this way to make clear we're talking about the real kind.

it's all for the arbitrator under *Prima Paint*. It hardly matters. *Stolt-Neilsen* and *Rent-a-Center* reveal a five justice bloc that sees itself as unconstrained by such niceties as doctrinal logic and public policies that support claimants and class actions. Instead, we're in an end game in which the Court majority feels empowered – and reading the 2010 election returns perhaps is empowered – to make rulings whose only logic is to ensure that pre-dispute arbitration is claim suppressing.

In this setting, can there be any doubt how *Concepcion* will be resolved? *Stolt-Neilsen* all but assures us that no party to an arbitration agreement can be sued in a class action without its (actual) consent. *Rent-a-Center* tells us that all enforceability questions concerning arbitration agreements are to be decided by arbitrators, with the sole exception of arbitral decisions to certify class claims – those are to be reviewed and reversed under FAA § 10. Arbitrators' decisions denying class actions will not be judicially reviewable; decisions granting class actions will be reviewed and reversed. Moreover, all the sorts of remedy-stripping arbitration clauses that have been struck down as unconscionable by courts will no longer be reviewable by courts. The bluff guarantee of the *Mitsubishi* Court 25 years ago, that courts will stand by to ensure that arbitration maintains "the substantive rights guaranteed by the statute" will no longer be true. Claimants will now depend on the virtually unreviewable good faith and kindness of arbitrators.[87] This is the justice system created for us when the Supreme Court is in charge of revising what the Founders gave us. Let's hope that arbitrators are angels after all.

CONCLUSION

The standard account of U.S. history tells us that the "institution of slavery" was on its way out due to economic factors until the invention of the cotton gin made slave agriculture profitable again. Prior to now, questions have been raised about how widespread is claim-suppressing arbitration, and some have suggested that claim-suppressing arbitration is on the decline.[88] Whether claim-suppressing arbitration has been declining, stagnating, or increasing, the Supreme Court's endorsement of claim suppression should lead to a dramatic spike in its use. If, as appears, simply imposing an arbitration clause provides blanket immunity against class actions, the attractiveness of such clauses will increase dramatically. A

[87] Even if arbitrators are conscientious about declining to enforce remedy-stripping provisions in arbitration clauses, they have the option to excise the remedy stripping terms and enforce the arbitration agreement; indeed they have the financial incentive to take this approach. Perversely, such an approach incentivizes experimentation with remedy-stripping agreements. *See* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. Rev. 49, 67-69 (2003).

[88] *See* Christopher R. Drahozal and Quentin R. Wittrock, *Is There a Flight from Arbitration*, 37 Hofstra L. Rev. 71, 71-76 (2008) (citing and then rebutting claims that pre-dispute arbitration use is on the decline).

renewed opportunity to experiment with other remedy-stripping devices – with the knowledge that a "*Rent-a-Center* delegation clause" will prevent judicial review – will also increase arbitration's attractiveness to would-be claim-suppressors. In a word, the Supreme Court's latest "arbitration trilogy" – *Stolt-Neilsen*, *Rent-a-Center* and, next up, Concepcion – will be claim-suppressing arbitration's cotton gin.